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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 SEAN M. PARK, MICHELLE PARK

12 Plaintiffs,

13 vs.

14 WACHOVIA MORTGAGE, FSB;  
15 WACHOVIA MORTGAGE  
16 CORPORATION; EXECUTIVE TRUST  
17 SERVICES; DEBORAH EISENBRAUN,  
18 in her capacity as sales agent for  
Wachovia Mortgage; MARK G.  
RACKERS; TIFFANY DUKE, in her  
capacity as loan counselor and agent for  
Wachovia Mortgage Corporation; DOES  
1-100,

19 Defendants.

CASE NO. 10cv1547 WQH (RBB)

ORDER

HAYES: Judge:

20 The matters before the Court are the Motion to Dismiss (ECF No. 118) filed by Wells  
21 Fargo Bank (“Wells Fargo”) on behalf of Wachovia Mortgage, FSB and Wachovia Mortgage  
22 Corporation<sup>1</sup> and the Motion to Dismiss filed by attorney Mark G. Rackers. (ECF No. 119).

23 **I. Procedural Background**

24 On July 26, 2010, Plaintiffs Sean M. Park and Michelle Park, proceeding pro se,  
25 initiated this action by filing a Complaint. (ECF No. 1). Plaintiffs filed an Amended  
26 Complaint on August 11, 2010. (ECF No. 3). On August 25, 2010, Wells Fargo filed a  
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28 <sup>1</sup> Wells Fargo explains that it is the “successor by merger” to Wachovia Mortgage, FSB  
and Wachovia Mortgage Corporation. (ECF No. 118 at 2).

1 Motion to Dismiss. (ECF No. 11). On January 12, 2011, this Court issued an Order  
 2 dismissing each of Plaintiffs' claims and permitting Plaintiffs to file a motion for leave to  
 3 file a second amended complaint. (ECF No. 78).

4 On January 19, 2011, Plaintiffs filed their Opposition to the Ex Parte Motion to  
 5 Expunge Notice of Pendency of Action. (ECF No. 80). On January 21, 2011, Wells Fargo  
 6 filed a Reply. (ECF No. 81). On January 26, 2011, Plaintiffs filed a Motion for Leave to  
 7 File a Second Amended Complaint. (ECF No. 83).

8 On April 29, 2011, Plaintiffs' Second Amended Complaint was filed which added  
 9 Deborah Eisenbraun, Tiffany Duke, and Attorney Mark G. Rackers as Defendants. (ECF  
 10 No. 114). On May 24, 2011, Wells Fargo filed a Motion to Dismiss on behalf of  
 11 Wachovia Mortgage, FSB and Wachovia Mortgage Corporation. (ECF No. 118). On May  
 12 25, 2011, Defendant Mark G. Rackers filed a Motion to Dismiss. (ECF No. 119). On June  
 13 13, 2011, Plaintiffs filed an Opposition. (ECF No. 120). On June 20, 2011, Wells Fargo  
 14 and Defendant Mark G. Rackers each filed a Reply. (ECF Nos. 121-22).

## 15 **II. Motions to Dismiss Second Amended Complaint (ECF Nos. 118-19)**

### 16 **A. Allegations of the Second Amended Complaint**

17 On March 28, 2008, Plaintiffs borrowed \$1,080,000.00 and entered into a Deed of  
 18 Trust encumbering property located at 456-458 10th Street, Del Mar, CA 92014. (ECF No.  
 19 114 at ¶ 84). Plaintiffs made payments of \$5,000.00 for the first 16 months of the loan. *Id.*  
 20 Thereafter, Plaintiffs stopped making payments. On November 17, 2009, a notice of  
 21 default and election to sell was recorded against the property. On August 30, 2010, the  
 22 property was sold at a trustee's sale.

23 Plaintiffs' Second Amended Complaint asserts the following seventeen claims: (1)  
 24 violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, et. seq.; (2) fraudulent  
 25 omissions; (3) violation of California's Business & Professions Code section 17200 for  
 26 unfair and fraudulent business practices; (4) breach of contract; (5) breach of the covenant  
 27 of good faith and fair dealing; (6) set aside trustees' sale; (7) to cancel trustee's deed; (8)  
 28 quiet title; (9) violation of the Real Estate Settlement and Procedures Act ("RESPA"), 12

1 U.S.C. § 2605 et seq.; (10) equitable tolling; (11) violation of the California Rosenthal Fair  
 2 Debt Collection Practices Act; (12) violation of the Federal Fair Debt Collection Practices  
 3 Act, 15 U.S.C. § 1692 et seq.; (13) wrongful foreclosure; (14) breach of fiduciary duty;  
 4 (15) fraud, intentional misrepresentation; (16) fraud, negligent misrepresentation; and (17)  
 5 accounting. Each claim is asserted against all Defendants which include: Wachovia  
 6 Mortgage, FSB AKA Wells Fargo Bank, N.A.; Deborah Eisenbraun, in her capacity as  
 7 sales agent for Wachovia Mortgage, FSB AKA Wells Fargo Bank; Wachovia Mortgage  
 8 Corporation, in its capacity as servicer and agent for Wachovia Mortgage FSB, AKA Wells  
 9 Fargo Bank; Executive Trust Services; Attorney Mark G. Rackers; Tiffany Duke, in her  
 10 capacity as loan counselor and agent for Wachovia Mortgage Corporation; and Does 1-100.

### 11 **B. Discussion**

12 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a  
 13 claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil  
 14 Procedure 8(a) provides: “A pleading that states a claim for relief must contain ... a short  
 15 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ.  
 16 P. 8(a)(2). Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a  
 17 cognizable legal theory or sufficient facts to support a cognizable legal theory. *See*  
 18 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

19 To sufficiently state a claim to relief and survive a Rule 12(b)(6) motion, a  
 20 complaint “does not need detailed factual allegations” but the “[f]actual allegations must be  
 21 enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*,  
 22 550 U.S. 544, 555 (2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his  
 23 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic  
 24 recitation of the elements of a cause of action will not do.” *Id.* (quoting Fed. R. Civ. P.  
 25 8(a)(2)). When considering a motion to dismiss, a court must accept as true all  
 26 “well-pleaded factual allegations.” *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1950  
 27 (2009). However, a court is not “required to accept as true allegations that are merely  
 28 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v.*

1 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see, e.g., Doe I v. Wal-Mart*  
 2 *Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) (“Plaintiffs’ general statement that  
 3 Wal-Mart exercised control over their day-to-day employment is a conclusion, not a factual  
 4 allegation stated with any specificity. We need not accept Plaintiffs’ unwarranted  
 5 conclusion in reviewing a motion to dismiss.”). “In sum, for a complaint to survive a  
 6 motion to dismiss, the non-conclusory factual content, and reasonable inferences from that  
 7 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v.*  
 8 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

9 **1. TILA - First Claim**  
 10 **Equitable Tolling - Tenth Claim**

11 Defendants Wachovia Mortgage, FSB and Wachovia Mortgage Corporation seek to  
 12 dismiss Plaintiffs’ first claim for violation of TILA on the grounds that the terms of the  
 13 note are clear, the claim is barred by the statute of limitations, Plaintiffs are not entitled to  
 14 equitable tolling, the claim for rescission is barred by the sale of the property, and Plaintiffs  
 15 are not entitled to rescission without valid tender.

16 Plaintiffs contend they did not discover Defendants’ TILA violations until they  
 17 retained the services [of] attorney Nathan Fransen ... and had their loan professionally  
 18 evaluated.” (ECF No. 120 at 19). Plaintiffs contend that the tender rule is not mandatory.

19 Plaintiffs’ first claim for violation of TILA alleges that Wells Fargo failed to comply  
 20 with the disclosure requirements for the loan. (ECF No. 114 at ¶¶ 103-22). Plaintiffs  
 21 allege that Defendants failed to “clearly, conspicuously and/or accurately disclose the terms  
 22 of the unsustainable negative amortizing ... [and t]hese violations are apparent on the face  
 23 of the TILA Disclosure Forms.” *Id.* at ¶ 105. Plaintiffs allege that the list of payment  
 24 amounts “have no relation to, and are also not based on the interest rate listed in the [truth  
 25 in lending disclosure statement].” *Id.* at ¶ 106(L). Plaintiffs allege that “the only place in  
 26 the Note where Defendants even inferentially reference negative amortization caused  
 27 Plaintiffs ... to believe that negative amortization is only a mere possibility, rather than an  
 28 absolute certainty.” *Id.* at ¶ 111. Plaintiffs allege that “the [note] charged Plaintiffs a much  
 higher monthly amount than what Defendants disclosed.” *Id.* at ¶ 118. Plaintiffs seek

1 rescission and damages.

2 **a. TILA Claim for Damages**

3 Damages claims under TILA must be brought “within one year from the date of the  
4 occurrence of the violation.” 15 U.S.C. § 1640(e). “[A]s a general rule the limitations  
5 period starts at the consummation of the transaction.” *King v. California*, 784 F.2d 910,  
6 915 (9th Cir. 1986). “[E]quitable tolling may be applied if, despite all due diligence, a  
7 plaintiff is unable to obtain vital information bearing on the existence of his claim.” *Santa*  
8 *Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000) (citation omitted). Generally, a  
9 litigant seeking equitable tolling of a limitations period bears the burden of establishing  
10 entitlement to equitable tolling. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Where a  
11 plaintiff alleges TILA violations during initial disclosures, equitable tolling is not  
12 appropriate if “nothing prevented [plaintiff] from comparing the loan contract, [the] initial  
13 disclosures, and TILA’s statutory and regulatory requirements.” *Hubbard v. Fidelity*  
14 *Federal Bank*, 91 F.3d 75, 70 (9th Cir. 1996) (citing *King v. State of Cal.*, 784 F.2d 910,  
15 915 (9th Cir.1986)).

16 The Complaint alleges that Plaintiffs obtained the loan on March 28, 2008.  
17 Plaintiffs did not file this lawsuit until July 26, 2010, more than two years after the  
18 transaction was consummated.<sup>2</sup> Accordingly, Plaintiffs’ TILA claim for damages is barred  
19 by the one-year statute of limitations, unless equitable tolling applies.

20 Plaintiffs allege that the “violations are apparent on the face of the TILA Disclosure  
21 Forms.” *Id.* at ¶ 105. Plaintiffs allege that “a forensic examination of the true documents  
22 revealed they are artfully complicated and misleading ....” (ECF No. 114 at ¶ 233(c)).  
23 However, Plaintiffs contend that they “had no way of previously discovering Defendants’  
24 fraudulent concealment” until June 16, 2009, when they retained “counsel Nathan Fransen  
25 ....” *Id.*

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26  
27 <sup>2</sup> Plaintiffs have alleged a cause of action for equitable tolling; however, equitable  
28 tolling is not a separate claim. Accordingly, Plaintiffs’ tenth claim for equitable tolling is  
dismissed. However, the Court will consider Plaintiffs’ allegations regarding equitable tolling  
as part of this claim for damages pursuant to TILA.

1 The Court finds that Plaintiffs have failed to assert any fact which would support a  
 2 finding that they were prevented “from comparing the loan contract, [the] initial  
 3 disclosures, and TILA’s statutory and regulatory requirements.” *Hubbard*, 91 F.3d at 70.  
 4 Although Plaintiffs contend that they did not actually discover the alleged TILA violations  
 5 until they retained counsel to perform a professional loan evaluation, Plaintiffs obtained the  
 6 loan evaluation on June 16, 2009, after the statute of limitations had already expired. The  
 7 Court finds that the Complaint does not adequately allege facts indicating that, “despite all  
 8 due diligence, [Plaintiffs were] unable to obtain vital information bearing on the existence  
 9 of [their] claim.” *Santa Maria*, 202 F.3d at 1178. The Court concludes that the Complaint  
 10 fails to allege sufficient facts to support a claim for damages under TILA because  
 11 Plaintiffs’ claim is barred by the statute of limitations and Plaintiffs are not entitled to  
 12 equitable tolling.

13 **b. TILA Claim for Rescission**

14 In order to prevail on a TILA rescission claim, the borrower will be obligated to  
 15 tender the property the borrower received from the creditor under the loan. *See* 15 U.S.C. §  
 16 1635(b); 12 C.F.R. §226.23(d); *see also Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1173  
 17 (9th Cir. 2003) (holding that “courts [are] free to exercise equitable discretion to modify  
 18 rescission procedures.”). “By far, the majority of Courts to address the issue recently have  
 19 required that borrowers allege an ability to tender the principal balance of the subject loan  
 20 in order to state a claim for rescission under TILA.” *Garcia v. Wachovia Mortgage Corp.*,  
 21 676 F.Supp.2d 895, 901 (2009) (collecting cases). This rule is in recognition of the  
 22 principle that “[e]quity will not interpose its remedial power in the accomplishment of what  
 23 seemingly would be nothing but an idly and expensively futile act, nor will it purposely  
 24 speculate in a field where there has been no proof as to what beneficial purpose may be  
 25 subserved through its intervention.” *Karlsen*, 15 Cal. App. 3d at 117; *see also Garza v.*  
 26 *Am. Home Mortgage*, No. CV 08-1477, 2009 WL 188604, at \*5 (E.D. Cal. Jan. 27, 2009)  
 27 (“The complaint fails to hint that [plaintiff] is able to fulfill her [tender] obligations under  
 28 15 U.S.C. § 1635(b) and 12 C.F.R. § 226.23(d). Rescission is an empty remedy without

1 [plaintiff's] ability to pay back what she has received.”).

2 In this case, Plaintiffs allege that the loan amount was \$1,080,000.00. (ECF No. 114  
3 at ¶ 197). Plaintiffs allege: (1) that tender “cannot be determined without a third party or  
4 judicial accounting” (2) that they provided “proof of tender” when they presented “Lori  
5 Ador” as a “qualified buyer,” and (3) that tender is not required. *Id.* at ¶¶ 199, 214, 216.  
6 Plaintiffs do not allege any specific facts related to the “qualified buyer,” such as which  
7 institution “qualified” the buyer and the amount of the offer. Plaintiffs do not otherwise  
8 allege specific facts as to how Plaintiffs would be able to tender the loan proceeds.  
9 Even construing the Complaint liberally, the Court finds that Plaintiffs’ allegations are  
10 insufficient to plausibly show an ability to tender. *See Iqbal*, 129 S. Ct. at 1950. The Court  
11 concludes that the Complaint fails to allege sufficient facts to support a claim for rescission  
12 under TILA. Plaintiffs’ first claim for violations of TILA is dismissed as to Wachovia  
13 Mortgage, FSB and Wachovia Mortgage Corporation.

## 14 **2. Violation of the Fair Debt Collection Practices Act - Twelfth** 15 **Claim**

16 Defendants contend that Plaintiffs’ twelfth claims for violation of the Fair Debt  
17 Collection Practices Act fails as a matter of law on the grounds that Defendants are not debt  
18 collectors. Defendants contend that the Fair Debt Collection Practices Act does not apply  
19 to a creditor or mortgage servicing company and that foreclosure activities are not debt  
20 collection activities.

21 Plaintiffs contend that Defendants have “frequently identified itself (sic) to Plaintiffs  
22 as a debt collector in all their correspondence with Plaintiffs ....” (ECF No. 120 at 20).  
23 Plaintiffs contend that the Fair Debt Collection Practices Act applies to agencies that  
24 furnish information to consumer reporting agencies.

25 Plaintiffs allege that Defendant Wachovia Mortgage Corporation is a “debt  
26 collector.” (ECF No. 114 at ¶ 15). Plaintiffs allege that Defendants used “unfair and  
27 unconscionable means in attempting to collect a debt” by “threatening to take actions  
28 prohibited by law including ... falsely stating the amount of a debt; increasing the amount  
of a debt by including amounts not permitted by law or contract; [and] improperly



1 foreclosing upon the subject property.” *Id.* at ¶ 240. Plaintiffs allege that Defendants  
2 failed to provide verification of the debt, Defendants continue its debt collection efforts  
3 after Plaintiffs disputed the debt in writing, Defendants attempted to collect an amount not  
4 expressly authorized by the loan agreement, and Defendants falsely state the amount that  
5 was owing on the debt.

6 The Fair Debt Collection Practices Act prohibits debt collectors from engaging in  
7 abusive, deceptive and unfair practices in the collection of consumer debts. *See* 15 U.S.C.  
8 § 1692. A defendant must be a “debt collector” to be liable pursuant to the Fair Debt  
9 Collection Practices Act. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995). “The legislative  
10 history of section 1692a(6) indicates conclusively that debt collector does not include ... a  
11 mortgage servicing company, or an assignee of a debt, as long as the debt was not in  
12 default at the time it was assigned.” *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th  
13 Cir. 1985).

14 The Fair Debt Collection Practices Act does not apply to foreclosure activities. *See*  
15 *Walker v. Equity 1 Lenders Group*, Case No. 09cv325 WQH (AJB), 2009 WL 1364430 at  
16 \*7 (S.D. Cal. May 14, 2009) (“The activity of foreclosing on [a] property pursuant to a  
17 deed of trust is not the collection of a debt within the meaning of the FDCPA ....”)  
18 (quotation omitted); *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or.  
19 2002) (“Foreclosing on a trust deed is distinct from the collection of the obligation to pay  
20 money. The FDCPA is intended to curtail objectionable acts occurring in the process of  
21 collecting funds from a debtor.... Payment of funds is not the object of the foreclosure  
22 action. Rather, the lender is foreclosing its interest in the property.”).

23 To the extent the Complaint alleges violation of the Fair Debt Collection Practices  
24 Act related to the ordinary foreclosure process, the act does not apply because the  
25 allegations are not related to collection activities. To the extent Plaintiffs allege Defendants  
26 acted outside of the scope of the ordinary foreclosure process, the Complaint fails to  
27 adequately allege how Defendants constitute “debt collectors” within the meaning of the  
28 act, and how Defendants violated the act. *See Iqbal*, 129 S. Ct. at 1950. The Court



1 concludes that Plaintiffs have failed to allege sufficient facts to support a claim for  
 2 violation of the Fair Debt Collection Practices Act. Plaintiffs twelfth claim for violation of  
 3 the Fair Debt Collection Practices Act is dismissed as to Wachovia Mortgage, FSB and  
 4 Wachovia Mortgage Corporation.

### 5 **3. RESPA - Ninth Claim**

6 Defendants contend that the RESPA claim fails on the grounds that Plaintiffs have  
 7 “admitted in other pleadings that Wells Fargo did timely respond to their [qualified written  
 8 request (“QWR”)] by providing Plaintiffs with relevant documents, but that Plaintiffs did  
 9 not believe Wells Fargo provided a ‘valid accounting.’” (ECF No. 118-1 at 27).

10 Defendants contend that Plaintiffs’ alleged QWR actually sought documents to support a  
 11 claim against the lender which “does not even constitute a legitimate QWR.” *Id.*

12 Defendants also contend that Plaintiffs cannot allege any damages to support a claim  
 13 pursuant to RESPA on the grounds that their loss was caused by “their own strategic  
 14 default.” *Id.* at 28.

15 Plaintiffs contend that whether Plaintiffs’ correspondence was a QWR is a question  
 16 of fact which cannot be resolved on the pleadings. Plaintiffs also contend that there were  
 17 RESPA violations as part of the loan modification.

18 A qualified written request is “a written correspondence, ... that– (i) includes, or  
 19 otherwise enables the servicer to identify, the name and account of the borrower; and (ii)  
 20 includes a statement of the reasons for the belief of the borrower, to the extent applicable,  
 21 that the account is in error or provides sufficient detail to the servicer regarding other  
 22 information sought by the borrower.” 12 U.S.C. § 2605(e)(1)(B). When a loan servicer  
 23 receives a qualified written request, it must either correct the borrower's account or, after  
 24 conducting an investigation, provide the borrower with a written explanation of: (1) why  
 25 the servicer believes the account is correct; or (2) why the requested information is  
 26 unavailable. *See* 12 U.S.C. § 2605(e)(2).

27 During the 60-day period beginning on the date of the servicer's  
 28 receipt from any borrower of a qualified written request relating to a  
 dispute regarding the borrower's payments, a servicer may not  
 provide information regarding any overdue payment, owed by such

borrower and relating to such period or qualified written request, to any consumer reporting agency

12 U.S.C. § 2605(e)(3).

**a. Actual Damages**

“Numerous courts have read Section 2605 [regarding qualified written requests] as requiring a showing of pecuniary damages to state a claim.” *Molina v. Washington Mutual Bank*, No. 09-CV-00894-IEG (AJB), 2010 WL 431439 at \*7 (S.D. Cal. Jan. 29, 2010) (collecting cases). “This pleading requirement has the effect of limiting the cause of action to circumstances in which plaintiff can show that a failure to respond or give notice has caused them actual harm.” *Shepherd v. Am. Home Mortg. Services, Inc.*, Case No. Civ. 2:09-1916 WBS GGH, 2009 WL 4505925 at \* 3 (E.D. Cal. Nov. 20, 2009) (citation omitted). A plaintiff is entitled to recover for the loss that relates to the RESPA violation, not for all losses related to foreclosure activity. *See Lal v. American Home Servicing, Inc.*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010) (“[T]he loss alleged must be related to the RESPA violation itself.”); *Torres v. Wells Fargo Home Mortg., Inc.*, No. C 10-04761 CW, 2011 WL 11506 at \*8 (N.D. Cal. Jan. 4, 2011) (“The plaintiff must also allege a causal relationship between the alleged damages and the RESPA violation.”) (citing *Lawther v. Onewest Bank*, Case No. C 10-0054 RS, 2010 WL 4936797 at \*7 (N.D. Cal. Nov. 30, 2010)).

Plaintiffs allege that on May 13, 2010, they sent a QWR but “Defendants failed to adequately respond to Plaintiffs’ demands to correct specific errors in the subject loan accounting, remove inappropriate and incorrect late fees and penalty charges or provide a valid accounting for the amount they claimed was owed as the subject loan debt.” (ECF No. 114 at ¶¶ 223-24). Plaintiffs allege that Defendants failed to provide “(1) proof of correction of errors in accounting; (2) proof of ownership ...; (3) yield spread premiums or other payments paid to broker, lender or servicer ...; (4) documents evidencing the servicer’s acquisition of the subject loan; (5) servicing agreements related to the subject loan; [and] (6) all documents evidencing defendant[’s] acquisition of the subject loan ....” *Id.* at 55-56. Plaintiffs allege that they suffered damages including “erroneous fees and

1 charges assessed on the subject loan,” “costs of fees associated with professional forensic  
 2 audits,” “costs and fees associated with this litigation,” and “emotional distress ....” (ECF  
 3 No. 114 at 56-67). Plaintiffs also allege that they suffered damages “by a reduction in the  
 4 credit rating due to improper credit reporting.... [and] loss qualification for their pending  
 5 refinance arrangements on their four other income properties ....” (ECF No. 114 at 56).

6 Even construing the Second Amended Complaint liberally, Plaintiffs fail to plead  
 7 non-conclusory factual allegations indicating how they were damaged by the alleged failure  
 8 to properly respond to the Qualified Written Request. *Cf. Allen v. United Fin. Mortg.*  
 9 *Corp.*, 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) (“Allen only offers the conclusory  
 10 statement that ‘damages consist of the loss of plaintiff’s home together with his attorney  
 11 fees.’ He has not actually attempted to show that the alleged RESPA violations caused any  
 12 kind of pecuniary loss (indeed, his loss of property appears to have been caused by his  
 13 default).”). Plaintiffs fail to allege how the failure of the Defendants to comply with  
 14 RESPA, as opposed to Plaintiffs’ default or the other alleged actions of Defendants,  
 15 plausibly caused the damages alleged in the Second Amended Complaint. *Cf. Lawther v.*  
 16 *OneWest Bank*, No. C-10-54, 2010 WL 4936797, at \*7 (N.D. Cal. Nov. 30, 2010) (granting  
 17 motion to dismiss RESPA claim for failure to adequately allege actual damages because  
 18 “[w]hat remains unexplained ... is how the QWR failure itself is causally connected to the  
 19 claimed distress of Lawther or his family”); *Lal v. Am. Home Servicing, Inc.*, 680 F. Supp.  
 20 2d 1218, 1223 (E.D. Cal. 2010) (“[S]imply having to file suit [does not] suffice as a harm  
 21 warranting actual damages. If such were the case, every RESPA suit would inherently  
 22 have a claim for damages built in.”). Plaintiffs fail to allege how the failure to respond to  
 23 the Qualified Written Request caused the reduction in their credit rating and the “loss  
 24 qualification for their pending refinance arrangements ....” (ECF No. 114 at 56). The  
 25 Court finds that Plaintiffs have failed to allege sufficient facts to support a claim for  
 26 damages under RESPA. *See Iqbal*, 129 S. Ct. at 1950.

#### 27 **b. Statutory Damages**

28 To recover statutory damages, a plaintiff must plead a pattern or practice of

1 noncompliance with RESPA. *See* 12 U.S.C. § 2605(f)(1)(b).

2       Plaintiffs also allege that “Plaintiff[s are] informed and believe[] that ... Defendant  
3 Wachovia Mortgage Corporation engaged in a pattern of and business procedures (sic) in  
4 non-compliance with RESPA as supported by Defendants’ discovery and evidence of  
5 numerous lawsuits across the country and expert witness testimony for trial including a  
6 multitude of judgments against Defendants for concealing their illegal negatively  
7 amortizing pick-a-pay loan and subsequent violations of RESPA ....” (ECF No. 114 at 57).  
8 To recover statutory damages, a Plaintiff must plead a pattern or practice of noncompliance  
9 with RESPA. *See* 12 U.S.C. § 2605(f)(1)(b) (“Whoever fails to comply with any provision  
10 of this section shall be liable to the borrower for ... any additional damages, as the court  
11 may allow, in the case of a pattern or practice of noncompliance with the requirements of  
12 this section, in an amount not to exceed \$1,000.”).

13       The Court finds that the allegations of a pattern or practice of noncompliance with  
14 RESPA are conclusory, and do not plausibly show a pattern and practice of RESPA  
15 violations by Wachovia Mortgage, FSB and Wachovia Mortgage Corporation in this  
16 action. *See Iqbal*, 129 S. Ct. at 1950; *cf. Lal*, 680 F. Supp. 2d at 1223 (finding the RESPA  
17 claim deficient because “Plaintiffs flatly claim a pattern of noncompliance but state no facts  
18 other than the assurance that at trial they will present other customers who also did not  
19 receive QWR responses from Defendant.”); *Garvey v. Am. Home Mortg. Servicing, Inc.*,  
20 No. CV-09-973, 2009 WL 2782128, at \*2 (D. Ariz. Aug. 31, 2009) (same). The Court  
21 concludes that Plaintiffs have failed to allege sufficient facts to support a claim for statutory  
22 damages under RESPA.

23       Plaintiffs ninth claim for violations of RESPA is dismissed as to Wachovia  
24 Mortgage, FSB and Wachovia Mortgage Corporation.

#### 25                   **4. State Law Claims**

26       The Second Amended Complaint alleges that federal question jurisdiction exists  
27 pursuant to 28 U.S.C. § 1331. (ECF No. 24 ¶ 1). The Second Amended Complaint asserts  
28 a claim against Wachovia Mortgage, FSB and Wachovia Mortgage Corporation for

1 violation of TILA, the Fair Debt Collection Practices Act, and RESPA. The Second  
 2 Amended Complaint asserts that supplemental jurisdiction exists over all state law claims  
 3 pursuant to 28 U.S.C. § 1367. The Second Amended Complaint does not allege that  
 4 diversity jurisdiction exists.

5 The federal supplemental jurisdiction statute provides: “[I]n any civil action of  
 6 which the district courts have original jurisdiction, the district courts shall have  
 7 supplemental jurisdiction over all other claims that are so related to claims in the action  
 8 within such original jurisdiction that they form part of the same case or controversy under  
 9 Article III of the United States Constitution.” 28 U.S.C. § 1367(a). A district court may  
 10 decline to exercise supplemental jurisdiction over a state law claim if:

- 11 (1) the claim raises a novel or complex issue of State law,
- 12 (2) the claim substantially predominates over the claim or claims over which  
 13 the district court has original jurisdiction,
- 14 (3) the district court has dismissed all claims over which it has original  
 jurisdiction, or
- 15 (4) in exceptional circumstances, there are other compelling reasons for  
 declining jurisdiction.

16 28 U.S.C. §1367(c). In this case, there have been no answers filed and the only remaining  
 17 Defendants are two individuals sued in their capacity as agents for Wachovia Mortgage,  
 18 FSB and Wachovia Mortgage Corporation as well as Executive Trust Services. Because  
 19 the Court has dismissed the federal law claims against Defendants Wachovia Mortgage,  
 20 FSB and Wachovia Mortgage Corporation, the Court declines to exercise supplemental  
 21 jurisdiction over the state law claims against Defendants Wachovia Mortgage, FSB and  
 22 Wachovia Mortgage Corporation pursuant to 28 U.S.C. §1367(c). *See Ove v. Gwinn*, 264  
 23 F.3d 817, 826 (9th Cir. 2001) (“A court may decline to exercise supplemental jurisdiction  
 24 over related state-law claims once it has dismissed all claims over which it has original  
 25 jurisdiction.”). Accordingly, the Motion to Dismiss the remaining state law claims against  
 26 Defendants Wachovia Mortgage, FSB and Wachovia Mortgage Corporation is GRANTED.

### 27 **C. Defendant Attorney Mark G. Rackers**

28 Defendant attorney Mark G. Rackers contends that “Plaintiffs allege 17 causes of

1 action, against all ‘Defendants.’ Mr. Rackers, however, is not mentioned in any of  
 2 Plaintiffs’ causes of action.” (ECF No. 119-1 at 4). Defendant Rackers contends that  
 3 “Plaintiffs have only named Mr. Rackers ... in an effort to harass and intimidate, which is  
 4 prohibited by the Federal Rules of Civil Procedure.” *Id.*

5 Plaintiffs contend that Rackers is an “aggressive foreclosure attorney[] ... who  
 6 obviously seek[s to] mislead the Court by slandering Plaintiffs’ reputation ....” (ECF No.  
 7 120 at 8). Plaintiffs contend that Rackers “crosses an ethical and professional line ....” *Id.*  
 8 at 9.

9 In the “Parties” section of the Complaint, Plaintiffs allege that “Mark Rackers who  
 10 not only acted as for attorney for Defendants but further elected to continue his slander of  
 11 Plaintiffs’ business reputation engaging in unwarranted tortious interference with Plaintiffs  
 12 contractual relationships with Plaintiffs’ tenants and others after being put on constructive  
 13 notice to cease and desist all these activities of Defendant Mark Rackers would be subject  
 14 to liability for his actions.” (ECF No. 114 at ¶ 7).

15 As discussed above Plaintiffs’ Second Amended Complaint asserts the following  
 16 seventeen claims: (1) violation of TILA; (2) fraudulent omissions; (3) violation of  
 17 California’s Business & Professions Code section 17200 for unfair and fraudulent business  
 18 practices; (4) breach of contract; (5) breach of the covenant of good faith and fair dealings;  
 19 (6) set aside trustees’ sale; (7) to cancel trustee’s deed; (8) quiet title; (9) violation of  
 20 RESPA; (10) equitable tolling; (11) violation of the California Rosenthal Fair Debt  
 21 Collection Practices Act; (12) violation of the Federal Fair Debt Collection Practices Act,  
 22 15 U.S.C. § 1692 et seq.; (13) wrongful foreclosure; (14) breach of fiduciary duty; (15)  
 23 fraud, intentional misrepresentation; (16) fraud, negligent misrepresentation; and (17)  
 24 accounting. There are no allegations against Rackers in the any of the claims. The Court  
 25 concludes that Plaintiffs have failed to allege sufficient facts to support a claim against  
 26 Defendant Rackers. Accordingly, Defendant Rackers is dismissed.

### 27 **III. Conclusion**

28 IT IS HEREBY ORDERED the Motion to Dismiss the Second Amended Complaint

1 (ECF No. 118) filed by Wells Fargo on behalf of Wachovia Mortgage, FSB and Wachovia  
2 Mortgage Corporation is GRANTED. Plaintiffs' claims against Wachovia Mortgage, FSB  
3 and Wachovia Mortgage Corporation are DISMISSED. The Motion to Dismiss Defendant  
4 Mark G. Rackers (ECF No. 119) is GRANTED. Plaintiffs' Second Amended Complaint is  
5 DISMISSED as to Defendant Mark G. Rackers.

6 DATED: September 30, 2011

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8 **WILLIAM Q. HAYES**  
9 United States District Judge  
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